

Barry N. Gutterman, Esq. (BG6410)
Barry N. Gutterman & Associates, P.C.
Attorneys for Defendants
Union Pacific Railroad Company
and Evergreen Marine Corporation
60 East 42nd Street, 46th Floor
New York, New York 10165
(212) 983-1466

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

MITSUI SUMITOMO INSURANCE CO., LTD.

Plaintiffs

v.

EVERGREEN MARINE CORPORATION and UNION
PACIFIC RAILROAD COMPANY

Defendants.

ECF Case

**07 CV 3874
(Judge McMahon)**

DEFENDANTS' STATEMENT OF DEFENSE

1. The liability of defendants Union Pacific Railroad Company ("UP") and Evergreen Marine Corporation ("Evergreen") is not contested (Pre-Trial Order, Stipulated Fact 45). However, the amount of recovery plaintiff is entitled to is contested.
2. UP and Evergreen contend that their liability is limited to \$500 per package or \$82,500 for the 165 packages specified on the face of the through bill of lading (TDS ¶12, EV-C Exhibits "A" & "B").
3. UP and Evergreen alternatively contend that their damages are limited to \$102,129.27 as of April 5, 2006 for 2 SDRs per kilograms for 35,234 kilograms (TDS ¶13, EV-C ¶11, Ex. A).
4. UP contends that 49 USC §10709 governs UP's carriage of the goods and that the Carmack Amendment does not apply (TDS ¶7, Ex. C, Item 110[D]).
5. Evergreen contends that it is not governed by the Carmack Amendment as its contract with

UP is a §10709 contract and the through ocean bill of lading is a maritime contract and no separate domestic bill of lading was issued by UP (EV-M ¶5, EV-C ¶9, TDS ¶9).

6. Evergreen contends that it is not a rail carrier for the subject shipment. (EV-C ¶7.)
7. UP contends that Maritime Law mandates enforcement of the package limitation.
8. UP contends that even if the Carmack Amendment applies, the through ocean bill of lading's offer of full liability rates satisfied any alternative offer requirement (EV-C ¶8, Ex. B ¶7 (2)).
9. UP and Evergreen contend that plaintiff cargo interests are bound by the terms and conditions of the MITA 2-A and UP and Evergreen are entitled to enforce the MITA 2-A's package limitation (TDS ¶8, Ex. C, Item 310(c) 10).

Dated: New York, New York
April 24, 2008

By: /s/ Barry N. Gutterman
Barry N. Gutterman, Esq. (BG6410)
Barry N. Gutterman & Associates, P.C.
60 East 42nd Street, 46th Floor
New York, New York 10165
Phone: (212) 983-1466
Fax: (212) 983-1229

Attorneys for Defendants
Union Pacific Railroad Company
and Evergreen Marine Corporation

To: David L. Mazaroli (DM-2929)
11 Park Place – Suite 1214
New York, New York 10007-2801
Phone: (212) 267-8480
Fax: (212) 732-7352
Attorneys for Plaintiff

UP2718.Statement of Defense